82-997

No.

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

PERRY WEARDON, PETITIONER,
a/k/a SAM AQUILA,
d/b/a
HERBAL EDUCATION CENTER

v.

THE UNITED STATES OF
AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LESLIE C. PRATT,
PATERSON, WALKE & PRATT, P.C.
149 STATE STREET
MONTPELIER, VT 05602-1310
802/229-5737

QUESTION PRESENTED FOR REVIEW

Whether, in Petitioner's trial on charges of violating the mail fraud statute, 18 U.S.C. 1341, his Constitutional rights were violated by the introduction, over the Petitioner's objection, of evidence that Petitioner defrauded prospective customers of his mail order business by failing to fill their orders or make refunds, when the Grand Jury indictment which led to Petitioner's prosecution was totally devoid of any allegation that such conduct formed a part of the alleged scheme to defraud.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is unreported and is printed in the Appendix hereto, infra, pages i-iv. The judgment of the United States District Court for the District of Vermont is printed in Appendix hereto, infra, pages v-xii.

JURISDICTION

The judgment of the Court of Appeals (Appendix, infra, pages v-xii) was entered on October 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, which provide, in pertinent part, as follows:

No person shall be held to answer for a capital,or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . (Amendment 5)

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . . (Amendment 6)

STATEMENT OF THE CASE

On July 31, 1981, the Grand Jury in this case issued its indictment charging Perry Weardon with thirteen Counts of violating the provisions of 18 U.S.C. §1341, and two Counts of violating 18 U.S.C. §2314. Essentially, the indictment charged the following "scheme to defraud": The Petitioner moved to Vermont, rented a one-family residence in Burlington, Vermont from January 1, 1981 to May 31, 1981, and from its basement conducted the business of Herbal Educational Center. With the assistance of his family and several temporary employees, Mr. Weardon compiled a mail order catalogue entitled Herbs and Spices for Home Use. This catalogue offered approximately 700 herbal products, including herbs, herbal formulas, essential oils, herbal seeds and herbal publications for sale, and included order forms for use in ordering such merchandise. Mr. Weardon arranged for art work, layout work, and printing of the catalogue, purchased from several suppliers named in the indictment, and caused 1,013,608 copies of the

catalogue to be printed by Upper Valley Press during the period from December 1980 through May 1981. Mr. Weardon acquired mailing lists said to contain the names of persons interested in natural foods and natural medicines, and arranged for mailings of the catalogues. In response to the catalogue mailings, Herbal Educational Center received approximately 30,000 orders, and, as a part of his activities, Mr. Weardon opened bank accounts in his name and in the name of the business, depositing in them approximately $750,000 obtained through orders from customers. The indictment listed 13 different mailings from Herbal Educational Center to various customers or from customers to the Center covering a period of time from April 3, 1981 through May 23, 1981.

Apart from the foregoing charges set forth in the indictment, all of which were generally consistent with the establishment and operation of a legitimate business, it set forth the following additional statements upon which the Government's claims of mail fraud really rested:

(a) Use by Perry Weardon of the fictitious name of Sam Aquila in conducting the Herbal Educational Center business (paragraph 3 of indictment);

(b) Use of the fictitious name of Lisa Seas on customer correspondence generated from the Center (paragraph 4(S));

(c) Claims that Perry Weardon "falsely [held] himself out by means of false statements in the catalogue to be a person particularly skilled and knowledgeable in the use of herbs." (paragraph 4(F));

(d) A claimed false statement in the catalogue that children of all ages could take "the formula" with good results (paragraph 4 (G));

(e) The use of biblical references in the catalogue for the purposes of "obtaining the trust and confidence of recipients" of the catalogue (paragraph 4(H));

(f) Use of false representations as to the medicinal qualities and curative powers of the herbs and herbal products offered for sale in the catalogues for the purpose of securing orders from persons suffering from "certain named maladies specified in the catalogue." (paragraph 4 (I)).

No claims were made in the indictment that Mr. Weardon ever had any intention of retaining money from customers without furnishing the product or products ordered, or of failing to refund moneys to dissatisfied customers.

On September 4, 1981, Mr. Weardon was arraigned in United States District Court in Rutland, Vermont. Mr. Weardon pled not guilty, and was released on his own recognizance pending further proceedings.

On September 18, 1981, Mr. Weardon's counsel filed a Motion to Dismiss for failure of the indictment to state an offense, asking for alternative relief in the form of a Bill of Particulars specifically detailing the alleged misrepresentations upon which the Government premised its allegations of fraud. A hearing was conducted on this Motion on September 28, 1981. During the course of this hearing, counsel for the Government made the following statement:

> I think it's clear that the government is required in drafting a mail fraud indictment to put the defendant on notice with a substantial indication of what the scheme is exactly that the defendant has been charged with. The government has done that in this case.
>
> I think that it's - the detail in the indictment clearly puts the defendant on notice as to exactly what scheme is involved in this prosecution. (Transcript, September 28, 1981, 1982, p. 10)

In a Memorandum of Decision filed October 27, 1981, the Court denied the Motion to Dismiss the indictment, but granted the Petitioner's request for a listing of the alleged misrepresentations upon which the Government premised its charges of fraud. As and for its bill of particulars in the matter, the United State's Attorney's office furnished a copy of Mr. Weardon's catalogue, containing check marks next to "all representations" which that office claimed to be false or fraudulent as charged in the indictment. None of the alleged misrepresentations checked off in the catalogue furnished by the Government gave any inkling of a contention that the Petitioner misrepresented his intentions as to merchandise delivery, or as to the issuance of refunds.

On February 8, 1982, a jury was drawn and trial was conducted over a period of time extending to February 25, 1982.

The case proceeded to trial in a factual posture which posed a rather troublesome complication to the defense of Petitioner. On May 19, 1981, in connection

with a consumer fraud action brought against him by the Attorney General's Office of the State of Vermont, ex parte Trustee Process had been issued against the business and personal accounts of Perry Weardon and Herbal Educational Center. (The existence of this consumer fraud action had been brought to the attention of the Court at the September 28, 1981 hearing on the Motion to Dismiss the indictment, and Petitioner's counsel had pointed out to the trial court that the action had resulted in Mr. Weardon's experiencing difficulty in filling orders. Furthermore, defense testimony and other testimony during the trial on the merits established that these state court proceedings ultimately resulted in the collapse of the Herbal Educational Center business, with the attached funds being held by the State of Vermont for the purpose, among others, of refunding money to customers of the business whose orders would not be filled in the ordinary course of the business. At the time of trial, the State of Vermont still held the proceeds of the Weardons' bank accounts, consisting of

some $180,000.00, pending an appeal in that proceeding.)

Since, at the commencement of trial, it seemed reasonably likely that the jurors would learn that this action by the State of Vermont had preceded the mail fraud trial, the existence of this state court proceeding was made known to the jurors during opening argument by the Petitioner's counsel.

During the course of the Petitioner's trial, this inherent complication in the Petitioner's defense was compounded when the Government called 11 witnesses to the stand to establish that Mr. Weardon had used the United States mails in order to distribute his catalogue to prospective customers. Of these 11 "mailing" witnesses, 2 had never ordered merchandise from Mr. Weardon's business, but 9 had placed their first order with Mr. Weardon shortly before Trustee Process had been enforced against his accounts in the State court proceedings. Immediately following the direct and cross-examination of the first of these mailing witnesses, who testified that she had placed an

order for merchandise in the catalogue on May 7, 1981, but that she had never received anything from Herbal Educational Center, defense counsel approached the bench and addressed the court as follows:

> MR. SHATZ: I'm going to move that the testimony be stricken. The basis of the indictment, the basis - - unless they're referring to counts fourteen and fifteen as to the transportation, the basis of the indictment is not the taking of money. The basis of the first thirteen is the misrepresentation in the catalogue, alleged misrepresentations in the catalogue. Some of these items weren't even on the bill of particulars they furnished as being false and fraudulent. The item that they are presenting here is beyond the scope of the indictment unless it's referring only - - and then it would have to be traced - - to Counts fourteen and fifteen. Because the indictment on the first thirteen does not refer to any money situation.
>
> THE COURT: Motion to strike is denied.

(Tr., p. 97-98)

The testimony of this witness was followed by similar testimony from the other eight mailing witnesses who had ordered merchandise.

At the conclusion of the Government's case in chief, Petitioner moved for acquittal on all charges. The Court dealt with the Motion by granting it as to Count VII, denying it as to Counts I through VI and VIII through XIII, and by denying or reserving ruling on the Motion as it applied to Counts XIV and XV, which alleged violations of 18 U.S.C. §2314 (Interstate transportation of moneys "stolen, converted, and taken by fraud").

The Petitioner's defense case included testimony from him and members of his family directed not only at the goal of rebutting the charges of misrepresentation set forth in the indictment, but attempting, as well, to meet the prosecution testimony relating to failure to deliver merchandise or issue refunds.

At the close of all of the evidence, upon Motion by the defense, Counts XIV and XV of the indictment were dismissed, and the case was submitted to the jury on the remaining 12 counts of mail fraud. In instructing the jury, the Court made no specific references to the testimony which had been admitted

relating to failure to deliver merchandise or to make refunds, confining its remarks, insofar as they related to the indictment, to the allegations set forth therein. The Court's instructions did, however, include general instructions which, while otherwise proper, permitted the jury to consider all of the testimony from the 9 mailing witnesses to which objection had been made. For example, the judge instructed as follows:

> To act with intent to defraud means to act knowingly and with a specific intent to deceive, ordinarily for the purpose of causing financial loss to another or bringing about some financial gain to the person making the representation.
>
> (Tr. of jury charge, p. 25)

The Court's instruction on the element of specific intent directed the jury to:

> look at all of the surrounding circumstances, the facts, that have been shown by the evidence that relate to the accusations made by the government, consider what the defendant did or failed to do in conducting his business enterprise, what he said or failed to say, how the operation was conducted, the manner in which the business was carried on, all the facts and circumstances that may shed any light on the purpose of the venture, and the full contents of the catalogue, itself. (Tr. of jury charge, p. 29)

Approximately 6 hours after the jury commenced deliberations, it requested that it be reinstructed on the "elements of the law pertaining to mail fraud and false advertising." The following morning, the jury was charged again as they had requested, with the Court concluding its instructions as follows:

> THE COURT: It has been called to my attention, members of the jury, that I may have used the word "harm" in referring to the intent to defraud by use of this scheme. Of course, the harm involved is harm in a financial sense, financial gain to the plaintiff [sic - "Defendant" no doubt intended] or financial loss to the persons who were the intended buyers. Physical harm from use of any of the products, of course, is not concerned in any way." (Tr. of jury charge, p. 59)

Following these instructions, the jury continued its deliberations, and ultimately returned with a verdict of guilty on the 12 counts of mail fraud then remaining.

On April 13, 1982, Mr. Weardon was sentenced to serve two years on Counts I through VI of mail fraud, running concurrently with each other, and fined $6,000.00 on Counts VIII through XIII. He was given

a further sentence of imprisonment on Counts VIII through XIII, with a suspended sentence and five years probation to commence upon release from confinement on Counts I through VI. The probation was subject to the conditions that he not engage in any business involving the use of the U. S. mails to solicit customers, and was not to engage, except with the express approval of his probation officer, in any business involving the sale of herbs or other medicinal substances.

On April 21, 1982, the Defendant filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit, and the question presented by this petition was briefed and argued therein. On October 14, 1982, the Court of Appeals issued an informal opinion, and held as follows on the question presented by this petition:

> Testimony establishing that customers had ordered products and received neither goods nor a refund was properly admitted. In light of the substantial evidence presented that a fraudulent scheme preexisted the use of the mails (based, primarily, on inferences the jury properly drew from the catalogue itself), any possible confusion between the Vermont State seizure of Weardon's

bank accounts and the alleged scheme in this case was minimal.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals in this case is in clear and irreconcilable conflict with this Court's holdings in Stirone v. United States, 361 U.S. 212 (1960) and Russell v. United States, 369 U.S. 749 (1962), and condones a patently clear violation of Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States. The crux of the holdings in Stirone and Russell is that in a felony case, an indictment cannot be added to by a variation between pleading and proof by either the prosecutor or the Court in such a way as to permit the Defendant "to be convicted on the basis of facts not found by, and perhaps not even presented to, the Grand Jury which indicted him." Stirone v. United States, supra, at 217; Russell v. United States supra, at 770. As this Court wrote in Russell v. United States, at 770:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the

> minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure . . . .
>
> This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. (Citations omitted).

At least one of the United States District Courts has recognized that the limitations of the Stirone and Russell cases apply to prosecutions under the Federal mail fraud statute. See, e.g., United States v. Mandel, 415 F.Supp. 997, 1015 (D.Md. 1976). ("The nature of the scheme can not be left so much to speculation that a prosecutor could proceed at trial to demonstrate a scheme essentially different from that relied upon by the government before the Grand Jury.")

As noted above, in STATEMENT OF THE CASE, the grand jury's indictment in this case made absolutely no reference to any claim of misrepresentation by the Defendant that merchandise would be delivered when he had no intention of doing

so, or that refunds would not be given, if they were requested. As the Court of Appeals noted in its opinion below, the expert testimony presented at trial in this case was to the effect that the claims as to some 53 of over 700 products offered for sale in Mr. Weardon's catalogue were unsubstantiated. Obviously, the scope, magnitude, and potential risk of financial loss to a consumer as a result of the sale to him of a product which might do less than was claimed for it represents a vastly less compelling set of circumstances upon which to premise a mail fraud charge than that represented by an out-and-out scheme of conversion.

In this case, there can be no question but what the testimony of the 9 mailing witnesses was calculated to show that Perry Weardon had engaged in not merely one, but two overlapping schemes to defraud. One scheme was charged in the indictment; the other scheme was not. Because this was true, there was simply no acceptable legal basis upon which the Second Circuit Court of Appeals could properly conclude, as it

did, that the jury convicted Perry Weardon "primarily, on inferences [which it] properly drew from the catalogue itself." The prohibition against amendment of the indictment set down by the Stirone and Russell decisions is clear and compelling. In Stirone, at 219, this Court wrote:

> Here, as in the Bain Case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted Petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. (Emphasis supplied)

Similarly, here, we cannot know whether the grand jury would have included in its indictment a charge that Perry Weardon had engaged in a scheme to defraud by means of misrepresentations as to his intention to furnish merchandise or make refunds. Indeed, it is entirely possible that the grand jury considered the inclusion of such an allegation in its indictment, but, recognizing the manifest unfairness of imputing such an intention to the Defendant when it

was the action of the State Court that resulted in such events, chose not to do so.

Even if it were to be argued that the introduction of the non-delivery, non-refund testimony from the mailing witnesses was not a substantial enough variance from the charges presented in the indictment to constitute a violation of Mr. Weardon's Fifth Amendment rights, it is clear that the variance in this case was sufficiently substantial as to constitute a violation of his rights under the Sixth Amendment to the Constitution. The Circuit Courts have held that even in instances where a variance does not alter the elements of the offense charged, the focus must be on whether or not there has been prejudice to the Defendant. Under the holdings of these courts, the defendant's substantial rights are prejudiced (a) if the indictment does not sufficiently inform him of the charges against him so that he may prepare his defense and not be surprised at trial or (b) if the variance is such that it will present a danger that

Defendant may be prosecuted a second time for the same offense. See, e.g. United States v. Schoenhut, 567 F.2d 1010 (3rd Cir. 1978), cert. denied, 439 U. S. 964 (1978); Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969). In the instant case, the Defendant was not apprised in advance of trial that testimony would be presented from witnesses that they had ordered and paid for merchandise which was never delivered, nor that they requested refunds and did not receive same. Obviously, the implication of such testimony was that Mr. Weardon was not only a fraud, but a thief, as well. If he had been able to anticipate such testimony being introduced, any number of tactical considerations relating to his defense might have been drastically altered. At the very least, he might have been able to furnish more persuasive proof of his lack of culpability for these shortcomings, and might have been able to minimize the impact which knowledge of the State Court proceedings undoubtedly had on the jury.

Moreover, without pursuing at length the close questions entailed in making double jeopardy determinations, it is by no means readily apparent that Perry Weardon could not, in the future, be subjected to criminal charges stemming from the receipt of moneys from prospective customers and failure to furnish merchandise or refunds (even though it is reasonably clear that the jury in this case may well have considered these factual circumstances in concluding that he was guilty of mail fraud).

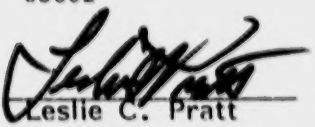
For all of the foregoing reasons, it is submitted that this Court should grant the review sought herein, in order that the Constitutional rights of the Petitioner may be vindicated.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Perry C. Weardon

By: Paterson, Walke & Pratt, P.C.
P. O. Box 1310
Montpelier, VT
05602

By: 
Leslie C. Pratt

APPENDIX

(1) Judgment and Probation/Commitment Order of United States District Court:

UNITED STATES
DISTRICT COURT
FOR
DISTRICT OF VERMONT

DOCKET No. 81-00060-01

UNITED STATES OF AMERICA

v.

PERRY WEARDON

JUDGMENT AND PROBATION/
COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date - April 13, 1982 with counsel, Leslie C. Pratt.

PLEA

Not Guilty

FINDING AND JUDGMENT

There being a verdict of guilty. Defendant has

been convicted as charged of the offense of Mail Fraud, in violation of 18 USC 1341 (Counts 1-6 and 8-13).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: That the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Counts 1-6, to run concurrently with each other. On Counts 8-13, the defendant is fined the sum of $1,000 on each count, for a total fine of $6,000. With respect to the penalty of imprisonment on Counts 8-13, imposition of sentence is suspended and the defendant placed on five (5) years' probation, to commence upon release from confinement on Counts

1-6, subject to the following special conditions of probation.

SPECIAL CONDITIONS OF PROBATION

1. You are not to engage, either as a principal or as an employee, in any business which involves the use of the U. S. Mails to solicit customers.

2. You are not to engage in any business, either as a principal or as an employee, which involves the sale of herbs or other medicinal substances, without the express approval of your probation officer.

It is further ordered that defendant Perry Weardon is to surrender himself to the institution designated by the Attorney General on May 11, 1982 by 2:00 p.m.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the

conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

(blank)

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

Signed By Chief Judge James S. Holden
Date: April 13, 1982

U. S. District Court
District of Vermont
Filed
April 14, 1:09 PM '82
Clerk: C. A. Burbank, Deputy Clerk

(2) Judgment Order and Informal Opinion of the United States of Appeals:

UNITED STATES COURT
OF APPEALS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of October, one thousand nine hundred and eighty-two.

Present: Honorable Irving R. Kaufman,
Honorable Ellsworth A. Van Graafeiland,
Honorable George C. Pratt,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

PERRY C. WEARDON,
Appellant. 82-1138

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellant argues that Judge Holden erred by not granting his motion for judgment of acquittal, on all the mail fraud counts, at the close of the government's case. He asserts that the opinion testimony of the prosecution's expert witness, Dr. McCormack, was insufficient, standing by itself, to sustain a conviction based largely on misrepresentations concerning the herbal products. Contrary to Weardon's argument, however, it is not necessary for the government to show a "universality of scientific belief that advertising representations are wholly insupportable," Reilly v. Pinkus, 338 U.S.

269, 276 (1949), before such testimony will withstand a Rule 29(a) motion. Instead, absent such "universal" belief, the government may use expert opinion testimony to create an inference of fraud, but "the likelihood of such an inference might be lessened should cross-examination cause a witness to admit that the scientific belief was less universal than he had first testified." Id. When other, independent evidence is adduced to demonstrate an intent to defraud, the opinion testimony is perfectly proper, and will be admitted, and sent to the jury, for what it is worth. United States v. Andreadis, 366 F.2d 423, 433 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

2. Substantial evidence of such an intent was presented in this case. Herbal Educational Center was small, understaffed, and understocked --and Weardon himself was unreachable by telephone--during its entire existence. Fictitious names were used, and the jury could reasonably have inferred HEC was never intended to be a legitimate, long-term, reputable

business operation. The government showed that much of the information in the catalogue published by Weardon came, verbatim, from already published sources, despite Weardon's representation that it was, essentially, based on his own personal knowledge. Weardon did not include in the catalogue or on the repackaged herbal products numerous warnings concerning their use. Neither FDA Inspector Maggio nor Jean Palmer a temporary HEC employee, saw any labels in the Weardon home which might have been used to indicate "for external use only" on certain products, although Weardon testified at trial that HEC possessed and used such labels. Representatives of two of Weardon's suppliers, Karen Junnti of Nature's Products and Sidney Rich of Phoenix Labs, both testified: Junnti related Weardon's apparent lack of concern over changes in the composition of herbal formulas (changes never, in any event, reflected in the catalogue), and appellant's remark, when asked whether the units in the formula recipes were by

weight or volume, that it did not matter. Rich, in response to a question posed by Weardon's own counsel, indicated that the ingredients of bee pollen listed in the catalogue were not the same as those in the pollen actually supplied by Phoenix. In sum, the jury could reasonably have concluded, and Judge Holden could have been satisfied, even without reference to McCormack's testimony, that appellant possessed the requisite intent to deceive.

3. McCormack testified at length, as to thirty herbs and thirty-five formulas, and concluded that Weardon's claims, in his catalogue, were unsubstantiated in twenty and thirty-three cases, respectively. He further noted that the dosage escalation schedule recommended in the catalogue was identical for each of sixty formulas, despite differences among them, and no provision was made for adjusting the dosages for children. The jury might reasonably have concluded that this testimony established unsubstantiated claims, undisclosed risks, and illogical

and hazardous dosage schemes, and so decided the catalogue contained numerous false claims. This evidence clearly amounted to falsity sufficient to support a mail fraud conviction.

4. Weardon's reliance on United States v. Baren, 305 F.2d 527, 528 (2d Cir. 1962) is inapposite. Proof that a customer was actually defrauded is necessary only in a mail fraud prosecution when it is clear that the product is capable of performance as advertised. Id. at 528; United States v. Andreadis, supra, 366 F.2d at 431-2.

5. Testimony establishing that customers had ordered products and received neither goods nor a refund was properly admitted. In light of the substantial evidence presented that a fraudulent scheme preexisted the use of the mails (based, primarily, on inferences the jury properly drew from the catalogue itself), any possible confusion between the Vermont state seizure of Weardon's bank accounts and the alleged scheme in this case was minimal.

Further, the jury was permitted to give weight to evidence establishing that Weardon had successfully withdrawn a large sum of money from his Woodville, New Hampshire bank, yet made no effort to recompense consumers.

6. The government's use of the People's Desk Reference was for impeachment and was therefore outside the hearsay rule entirely. Moreover, defense counsel's failure to object to testimony establishing Portland as the place of publication precludes attack on appeal. See United States v. Katz, 601 F.2d 66, 67 (2d Cir. 1979).

7. Appellant's Fifth Amendment argument is without merit. Judge Holden did not reserve decision on the Rule 29(a) motion. Rather, he denied it without prejudice to renewal at the end of the defendant's case. In any event, Weardon failed to demand a decision on the motion, which was his responsibility if he believed it had been denied, and the absence of such a demand amounts to a waiver of

any claim regarding sufficiency of the government's proof. United States v. Rosengarten, 357 F.2d 263, 266 (2d Cir. 1966).

8. The judgment of conviction is affirmed.

/s/ Irving R. Kaufman

/s/Ellsworth A. Van Graafeiland

/s/George C. Pratt, Circuit Judges

United States Court of Appeals
Second Circuit
Filed Oct. 14, 1982
A. Daniel Fusaro, Clerk